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Supreme Court of the United States

OCTOBER TERM, 1941

No. 133

JOHN O. KROUSE, *Petitioner,*

v.

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, *Respondents*

PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

CHARLES A. HORSKY,
DANIEL L. BRENNER,
Attorneys for Petitioner.

JOHN T. SAPIENZA,
Of Counsel.

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The petitioner respectfully requests reconsideration of his petition for a writ of certiorari to the Supreme Court of Kansas, which this Court denied on October 13, 1941.

STATEMENT

The petitioner is a railroad worker who was disabled on April 17, 1938, during the performance of his duties in the employ of the respondents. There was no fault or negligence on their part. In fact, it was stipulated in the hearing upon petitioner's claim before the Commissioner of Workmen's Compensation in Kansas City, Kansas, that "claimant met with an accidental injury

arising out of and in the course of his employment with the respondents * * *" (R. 8).

The Commissioner made an award of compensation after finding that the petitioner had suffered an accidental injury in the course of his employment with the railway company; that both employee and employer were, on the date of the injury, subject to the provisions of the Kansas Workmen's Compensation Act, and that, as a result of the accidental injury, the petitioner had suffered a permanent and total disability. An appeal was taken to the District Court of Wyandotte County, Kansas, which adopted the findings, conclusions and award of the Commissioner (R. 40). The Supreme Court of Kansas, without questioning the findings of fact, reversed the judgment of the District Court on the ground that the petitioner was performing work connected with the operation of an instrumentality of interstate commerce or so closely related thereto as to be an essential part of it, and for that reason was subject to the federal act and not to the Kansas Workmen's Compensation Act (R. 78-79). It remanded with directions to enter a judgment for the respondents (R. 73). The state court followed *New York Central Railroad Co.* v. *Winfield,* 244 U. S. 147 (1917). For the reasons given below, the petitioner renews his request that this Court reconsider and overrule that decision.

COVERAGE OF KANSAS STATUTE

The Kansas legislature clearly intended to provide compensation for injuries in interstate commerce within its reach. It excluded only those "not subject to the legislative power of the state". Kan. Gen. Stat. (1935)

§ 44-506.[1] Prior to the decision of this Court in *New York Central Railroad Co.* v. *Winfield,* 244 U. S. 147 (1917), it had been held by Kansas trial courts that until Congress should see fit to legislate on the subject of compensation for injuries to workmen engaged in interstate commerce where their employers were not at fault, that field had properly been occupied by the state legislature. The Supreme Court of Kansas receded from this position only because of the decision of this Court. In *Matney* v. *Bush,* 102 Kan. 293, 169 Pac. 1150 (1918), an award under the Kansas act was vacated on the authority of the *Winfield* case, the state court saying,

> "It is therefore needless to discuss the subject, and *it must be held* that our state workmen's compensation act does not extend to cases where workmen engaged in interstate commerce are injured in the course of their employment without their employer's fault." (*Id.* at 294, italics supplied.)

It cannot be doubted that the application of the Kansas statute has been restricted solely because of *New York Central Railroad Co.* v. *Winfield, supra.* In any event, this decision should be overruled and the Supreme Court of Kansas should be allowed an opportunity to construe the statute, free from its compulsion. *Cf. State Tax Commission* v. *Van Cott,* 306 U. S. 511 (1939).

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[1] "This act shall not be construed to apply to business or employment which, according to law, are so engaged in interstate commerce as to be not subject to the legislative power of the state, nor to persons injured while they are so engaged."

REASONS FOR REHEARING

1. The Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. A. § 51, renders common carriers by railroad liable in damages to their employees in interstate commerce, for injury or death resulting from the negligence of any of their officers, agents or employees. The act is silent with respect to injuries in interstate commerce without fault on the part of railroads. In *New York Railroad Co.* v. *Winfield,* 244 U. S. 147 (1917), a majority of this Court found this silence significant. Over a vigorous dissent by Mr. Justice Brandeis and Mr. Justice Clarke, it held that Congress had occupied the entire field of compensation for injuries to railroad employees in interstate commerce, had impliedly excluded liability for injuries occurring without negligence (*id.* at 153), and had, impliedly again, prohibited the states from requiring compensation for such injuries.

In *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board,* No. 252, October Term 1941, probable jurisdiction noted on October 13, 1941, this Court will consider the fundamental principle upon which the *Winfield* case was decided. It is there contended that Congress, by passing the National Labor Relations Act which regulates the unfair labor practices of employers, has preempted the field of labor relations in interstate commerce, so as to preclude the states from defining and creating unfair labor practices on the part of labor organizations and employees of companies in such commerce. Both this appeal and *New York Central Railroad Co.* v. *Winfield, supra,* deal with the power of the states to legislate for the health, safety and welfare of their citizens in that portion of the interstate field in which Congress has

not expressly acted and from which it has not expressly excluded them. See also *Cloverleaf Butter Co.* v. *Patterson,* No. 28, October Term, 1941, cert. granted on April 7, 1941.

2. *New York Central Railroad Co.* v. *Winfield, supra,* should be overruled. Too long has it constituted a judge-made barrier against the relief of victims of unavoidable accidents in interstate transportation by railroad.

(a) The majority's construction of the Federal Employers' Liability Act is erroneous for the reasons persuasively stated by Mr. Justice Brandeis. 244 U. S. at 154-70. Time has not subtracted from their validity or cogency.

(b) The decision was a departure from the well-established principles then governing the determination whether a federal statute regulating commerce had superseded state legislation in the exercise of the police power. See, *e. g., Missouri, Kansas & Texas Railway* v. *Haber,* 169 U. S. 613, 623 (1898); *Savage* v. *Jones,* 225 U. S. 501, 529 (1912).[2] It is inconsistent with later decisions of the Court announcing adherence to those principles. See, *e. g., Kelly* v. *Washington,* 302 U. S. 1, 10 (1937); *Dickson* v. *Uhlman Grain Co.,* 288 U. S. 188 (1933). In *Kelly* v. *Washington, supra,* the Court upheld state legislation relating to the inspection and regulation of vessels against the contention that it encroached upon a field covered by federal acts and regulations with respect to navigation upon the navigable waters of the United States. It said:

> "The principle is thoroughly established that the exercise by the State of its police power, which

[2] The cases are collected in the dissenting opinion. 244 U. S. at 156, n. 1.

> would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'." (p. 10.)

There is no "direct and positive" conflict between the Federal Employers' Liability Act which provides a remedy for injuries in interstate commerce from the negligence of carriers, and the state statutes which require compensation for injuries in that commerce resulting from no fault on their part. The two can easily "be reconciled or consistently stand together". For, in the words of Mr. Justice Brandeis, "The field covered by Congress was a limited field of the carrier's liability for negligence, not the whole field of the carrier's obligation arising from accidents." 244 U. S. at 169.

(c) The no-man's land established by the *Winfield* case has been expanded by this Court's recent decisions on the Commerce Clause [3] and the 1939 amendment to the Federal Employers' Liability Act.[4] With the in-

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[3] "Certainly many activities, far less obviously a part of 'interstate commerce', have been declared subject to federal regulation under the steadily expanding interpretations of the Commerce Clause of the Federal Constitution." Opinion below, R. 81. Compare *Hammer* v. *Dagenhart*, 247 U. S. 251 (1918), and *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936), with *United States* v. *Darby*, 312 U. S. 100 (1941), and cases cited, *id.* at 123.

[4] "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the

creased coverage of injuries from negligence, the area from which the state police power is excluded by implication has been greatly enlarged. The injustice to railroad workers needs no elaboration. The repudiation of *New York Central Railroad Co.* v. *Winfield* as an authoritative construction of the Federal Employers' Liability Act is of crucial importance, not only for this petitioner, but also for the many thousands of railroad employees who are exposed constantly to the innumerable unavoidable accidents bound to occur in their hazardous employment.

CONCLUSION

It is therefore respectfully submitted that this petition for rehearing should be granted, that the Court's order of October 13, 1941, denying the writ should be vacated, and that the petition for a writ of certiorari should be granted.

CHARLES A. HORSKY,
DANIEL L. BRENNER,
Attorneys for Petitioner.

JOHN T. SAPIENZA,
Of Counsel.

I, Charles A. Horsky, attorney for petitioner, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

CHARLES A. HORSKY.

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liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended." 53 Stat. 1404, 45 U. S. C. A. §51.